

2012 IL App (1st) 101251-U

FIFTH DIVISION
January 20, 2012

No. 1-10-1251

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|--------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 07 CR 7237 |
| |) | |
| ANTONIO RAMIREZ, |) | Honorable |
| |) | Mary Margaret Brosnahan, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court found defendant's testimony incredible "from start to finish," the court's alleged misrecollection of part of that testimony did not rise to plain error.

¶ 2 After a bench trial, defendant Antonio Ramirez was convicted of possessing contraband in a penal institution. Defendant was sentenced to five years in prison, to run consecutive to the 14-year prison term he received pleading guilty to predatory criminal sexual assault just prior to his bench trial. On appeal, defendant contends that he is entitled to a new trial because the trial

court incorrectly recalled defendant's testimony and failed to consider other evidence critical to his compulsion defense. We affirm.

¶ 3 At trial, Daniel Schickel, a correctional officer, testified that around 7:25 p.m. on March 20, 2007, he was part of a team that was assigned to pat down jail inmates as they were going to church services. Schickel searched defendant first and, as he conducted the pat down, he noticed a hard object in the area of defendant's groin. Upon investigation, Schickel recovered two metal objects, which were shown at trial, from a pouch in defendant's boxer shorts. One of the objects was sharpened to a point and had a piece of fabric wrapped around the bottom while the other was a thin piece of metal about six-and-a-half inches long. Metal objects like the ones recovered from defendant are illegal contraband. Schickel does not speak Spanish and was not aware of any Spanish-speaking officers assigned with him that day.

¶ 4 Defendant testified that on March 20, 2007, he was approached by a gang of inmates that lived on his tier. He explained that members of the same gang had beaten him previously. That day the gang told defendant to transport the metal objects and threatened to stab him if he refused. When asked what kind of harm he thought would come to him if he refused, defendant responded, "[t]hey could stab me. They were threatening me." He did not tell the correctional officers he had been threatened because he only speaks Spanish and he was afraid of the officers. He had been beaten by correctional officers and the day he arrived in prison the officers put him into a cell that was already at its maximum occupancy of two inmates. About an hour and a half after defendant received the objects, the inmates went to church services. One of the inmates who threatened defendant was directly behind him in line. The inmate told defendant in Spanish to throw the objects away when he saw the correctional officers. A Spanish-speaking officer heard, threw defendant against the wall, and recovered the objects. Defendant testified that Schickel was not the officer who patted him down or recovered the objects and that he did not

remember Schickel being there at all. Defendant also stated that the metal objects shown at trial were not the same objects recovered from him.

¶ 5 The State then introduced a certified statement of conviction for the offense of predatory criminal sexual assault to impeach defendant's credibility.

¶ 6 In making its findings, the trial court began by saying, "[i]f I were to take defendant's testimony as true from start to finish, and I will address that in a moment; but just for the sake of argument, taking his testimony as true," there was still an hour and a half during which defendant could have withdrawn from the enterprise. The court further stated that it believed defendant only felt the threat of a possible future injury because:

"[a]ccording to him, when he first got over to the jail on the charges of the predatory criminal sexual assault, he says he was beaten up by some jail guards.

So at best he is telling us with respect to this case there are some guys who forced him to take it.

He is not saying they beat him up previously. He is saying that the jail guards beat him up previously."

The court went on to say "getting to the defendant's testimony, itself, versus that of the officer, I find that the defendant's testimony is incredible," that it found defendant's testimony incredible "from start to finish" and that defendant was "wholly incredible." The trial court found defendant guilty of possession of contraband in a penal institution and sentenced him to five years in prison, to run consecutive to the 14-year prison term he was currently serving.

¶ 7 On appeal, defendant contends he was denied a fair trial because the trial court incorrectly recalled his testimony. Specifically, defendant argues the trial court wrongly believed that defendant did not testify he was previously beaten by the gang members who threatened him.

Defendant also argues that by finding he did not act under compulsion because he failed to withdraw, the trial court ignored his testimony that he feared the correctional officers.

¶ 8 As an initial matter, defendant concedes that he forfeited review of this issue by failing to contemporaneously object and properly preserve it in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). To overcome forfeiture, the defendant bears the burden of persuasion to establish plain error. *Hillier*, 237 Ill. 2d at 545. To demonstrate plain error, the defendant must show that a clear and obvious error occurred and that either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 9 Even assuming the trial court did commit error by failing to properly recall defendant's testimony, defendant cannot show it rose to the level of plain error. Here, the case turned on witness credibility. The only evidence presented at trial was the testimony of Schickel and defendant. Schickel testified that he patted down defendant and discovered two metal objects that constituted contraband. Defendant did not deny possessing the objects, or that such possession was illegal, but testified that he had been previously beaten by the gang of inmates that ordered him to transport the objects, and that the gang threatened to stab him if he refused. Defendant also testified that Schickel was not the officer who patted him down, that he had been beaten by correctional officers since the day he had arrived at the prison, and that the objects shown at trial were not the same objects recovered from him. The trial court made the alleged error while it was "for the sake of argument, taking [defendant's] testimony as true." However, in making its ultimate ruling, the court specifically stated that it disbelieved defendant's testimony "from start to finish." Credibility determinations are in the province of the trier of fact. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). Given this finding, defendant cannot establish that the

court actually believed that *any* beatings occurred. Moreover, even if it did, the court found that defendant was not in the type of "imminent" danger of great bodily harm sufficient to establish a compulsion defense. See *People v. Colone*, 56 Ill. App. 3d 1018, 1021 (1978) (threat of future injury insufficient to excuse criminal conduct). Therefore, defendant cannot show the evidence was closely balanced because despite defendant offering testimony to support a defense of compulsion, the trial court did not accept defendant's testimony as true.

¶ 10 Furthermore, as the trial court did not believe defendant's testimony, its decision would not have been different if it had corrected the alleged error. Therefore, we find the alleged error was not so serious that it challenged the integrity of the judicial process. See *People v. Durgan*, 346 Ill. App. 3d 1121, 1140 (2004) (where the trial court's decision would not have been different had it recalled and considered testimony from the proper witness instead of a witness from a previous trial, the defendant's due process rights were not denied).

¶ 11 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 12 Affirmed.